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IN THE

Supreme Court of the United States

October Term, 1939

ROBERT H. JACKSON, Attorney General of The United States, on behalf of the United States, and as successor to the Alien Property Custodian, Petitioner,

v.

IRVING TRUST COMPANY, as Executor of HERMANN SIELCKEN, Deceased, *et al.*

Brief for Irving Trust Company as Executor of Hermann Sielcken, Deceased, in Opposition to Petition for Writ of Certiorari.

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v.

IRVING TRUST COMPANY, as Executor of HERMANN SIELCKEN, Deceased, *et al.*

Respondent's Answering Brief to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

I.

History of the Case.

This is not a suit between the petitioner and the respondent as the title now used by the petitioner might indicate.

The petition refers to two suits, one which it calls "the prior suit" (p. 3), and the other "the present suit" (p. 7). There is only one suit. That suit was brought in 1927 by John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against Howard Sutherland, as Alien Property Custodian, Frank White, as Treasurer of the United States, and Zentral Einkaufs Gesellschaft, m.b.H., defendants. All the defendants appeared and answered, the

defendants Custodian and Treasurer moving to dismiss the bill for insufficiency; and, after a trial of the suit, participated in by all parties, a final decree for the plaintiffs was rendered on December 30, 1929. Without appealing from it, the defendants Custodian and Treasurer paid it on April 12, 1930 (R. 2 and 1071).

What the petition calls "the present suit" was in fact merely a motion made in the name of the United States to vacate that decree, over eight years after it had been paid; which motion was entitled in the original suit (R. 5), and was made solely "on the ground that said final decree is void because this Court", *i. e.*, the District Court, "was without jurisdiction to enter the same" (R. 5).

This respondent was not a party to the suit. It was allowed to intervene on the motion to vacate as one "having an interest acquired under the decree of December 30, 1929 subsequent to its entry". The defendant Treasurer, did not join in the motion; and the motion was abandoned almost at the start as against the Executor of the plaintiff Nielsen (R. 3 and 295-296). Though the motion was originally made in the name of the United States, which was not nominally a party, the petitioner, as Successor to the Alien Property Custodian, was subsequently brought in, and the matter has been dealt with as though he had originally been the moving party.

Though the decree was not a nullity unless it so appeared on the face of the record, the motion was not made on the record. It was made on the affidavit of an attorney in the Department of Justice who did not pretend that he had any knowledge of the facts (R. 7 and 53). The

affidavit with the exhibits attached dealt with matters *dehors* the record and largely with events subsequent to the decree, in an obvious effort to retry the case on affidavits and to establish a charge of fraud and collusion. Every such charge was vigorously denied in answering affidavits of persons having actual knowledge of the facts.

At the same time this respondent, from the inception, insisted that no such issues could be tried on motion, or otherwise than by bill of review (R. 316).

The Circuit Court of Appeals, citing *United States* v. *Throckmorton,* 98 U. S. 61, 66, held that the decree could not be impeached for fraud, "on the very grounds urged at the original trial" (R. 1125); that even the remedy by bill of review for fraud extrinsic to the issues involved in the suit, would only be allowed if the evidence "was not available at the time the original suit was litigated" and if it were "presented without undue delay after discovery" (R. 1126); and that "in no event would there be any justi-"fication for setting aside a decree on affidavits without "examination and cross-examination of witnesses, particu-"larly where the affidavits proved to be contradictory in "respect to important issues" (R. 1126). In concluding, the Circuit Court of Appeals pointed out that the District Court in 1939 "only vacated the decree for lack of jurisdic-"tion" (R. 1126).

The order of the District Court vacating the decree will be found at page 1103 of the record. The sole ground of vacation was declared to be that the decree was "void and of no effect whatsoever because this Court was without jurisdiction to enter the same" (R. 1106).

No error is assigned and no question for review is suggested by the petition in respect of the above rulings of the Circuit Court of Appeals as to any claims of fraud or collusion; although the petitioner refers to charges of fraud and collusion in footnotes on pages 7 and 8.

The petition, like the original motion, really presents only the basic question of the jurisdiction of the suit brought in 1927 and determined by final decree in 1929.

There were no express findings in support of the decree of 1929, since it was rendered before the adoption of the rule requiring findings. It, therefore, imports findings favorable to the plaintiffs on every issue in the case.

The Court will want to know what the issues were and how they were determined by the decree. The pleadings and the decree will not be found in the moving papers. The notice of motion made no mention of the pleadings. This respondent, in its petition for leave to intervene, submitted the pleadings, including the 1928 motion of the defendants Alien Property Custodian and Treasurer to dismiss the bill for failure to state facts entitling plaintiffs to relief under the Trading with the Enemy Act; as well as the decree. They will be found at pages 318-352 of the record.

II.

The petitioner's statement of the case and of the questions involved omits essential facts and disregards the issues involved and the determination of them by the Decree of 1929.

The governing facts were well stated by the Circuit Court of Appeals (R. 1118-1124).

(A) The petition, in stating the contents of the pleadings, makes vital omissions and some errors:

(1) It omits two vital paragraphs of the bill—the first and second—though it purports to paraphrase the substance of the second paragraph in a footnote on page 5. The important first paragraph of the bill the petitioner ignores completely. It may be only a coincidence that the District Court in passing on the motion to vacate also overlooked the first paragraph, although Judge HAND in the Circuit Court of Appeals called attention to the oversight (R. 1123). We quote the two paragraphs in full:

> "First: At all the times hereinafter mentioned the plaintiffs, John S. Sorenson and Thorleif S. B. Nielsen, and one Hermann Sielcken, all being citizens and residents of the United States, were engaged in business as exporters, importers and commission merchants as copartners doing business under the firm name and style of Crossman & Sielcken, and said partnership continued its said business in regular course, up to the date of the death of said Hermann Sielcken, as hereinafter set forth.

"Second: Said partnership of Crossman & Sielcken at all times has had its principal place of business in the Borough of Manhattan, City, State and Southern District of New York, and has been and is a resident of said Borough of Manhattan, City and State of New York, and has not at any time been a resident within territory (including that occupied by the military and naval forces) of any nation with which the United States was at war and was not, nor at any time has it been, an enemy or ally of enemy within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as and herein referred to as the Trading with the Enemy Act or in any act amendatory thereof and supplemental thereto or in any proclamation or executive order issued by the President of the United States pursuant to Subsection (c) of Section 2 of said Trading with the Enemy Act" (R. 319).

(2) The petition merely says, also in a footnote, that the answer of Z.E.G. and the Alien Property Custodian denied knowledge as to the allegation that the partnership was neither an enemy nor an ally of enemy.

The allegations of both paragraphs were squarely put in issue by all of the defendants, except that Z.E.G. admitted the existence of the partnership prior to the outbreak of the war and that its principal place of business was in the Borough of Manhattan (R. 324-5 and 338).

The answer of the defendant, Z.E.G., expressly alleged (in its paragraph 13):

"That at the outbreak of war between the United States and Germany, to wit, April 6, 1917, the said Hermann Sielcken resided in Germany and became an alien enemy" (R. 329).

(in its paragraph 14):

> "That the firm of Crossman & Sielcken was dissolved by the outbreak of war" (R. 329).

(in its paragraph 27):

> "That the said Hermann Sielcken owned all the assets of Crossman & Sielcken; that the estate of Hermann Sielcken succeeded to all assets thereof and the plaintiffs are estopped from making the claim set forth herein" (R. 331).

The petition says (p. 4) that the Alien Property Custodian answered, "adopting the defenses of Z.E.G." The Custodian and Treasurer appeared and answered on January 23, 1928 (R. 380), but the answer of Z.E.G. was not filed until September 6, 1929 (R. 2). Naturally, the former answer says not a word about the latter, which was not even in existence when the former was filed (R. 338-341). Nevertheless all these issues were raised and were disposed of by the decree in 1929 in favor of the plaintiffs.

(B) The petition says nothing of the motion of the Custodian and Treasurer to dismiss the bill on the ground, among others, that "(3) plaintiffs have not stated facts sufficient to entitle them to equitable relief under the provisions of the Trading with the Enemy Act" (R. 337-8). At the same time the petition suggests no question for review as to the sufficiency of the bill.

(C) The petition says on page 4 that "the District Court held that the shipments were made pursuant to c.i.f. contracts and that the risk of loss therefore rested with the consignee." The bill of complaint alleged, and

the decree sustained the allegation, that the agreement between Crossman & Sielcken and the predecessor of Z.E.G. was one of agency to purchase goods for the account of said predecessor and for repayment of the sums expended with a commission of ten per cent thereon; and the suit was for the amount actually paid out by Crossman & Sielcken, plus the agreed commission of 10% (Paragraphs Seventh, Eighth and Ninth, R. 320, 321).

The petition also says on page 4 that the District Court found "that Z.E.G. was indebted to the *partnership.*" The statement is inaccurate. The decree expressly adjudged that Z.E.G. "is indebted to *the plaintiffs*" in the sum stated and that the defendants, Custodian and Treasurer, are directed to pay said amount "to the plaintiffs" out of the funds of the debtor seized by the Alien Property Custodian and held by him and the Treasurer (R. 351-352), thus disposing completely of the defense that the plaintiffs were not the owners of the claim.

(D) The petition further misstates the issues and the determination of them by the decree.

Despite the above quotations from the bill and the answer of Z.E.G., and despite the motion to dismiss, the petition says (p. 5) that

> "The sole issue litigated in the 1929 proceeding was whether any debt was due from Z.E.G. No issue was made by the pleadings or raised at the trial as to whether the surviving partners were precluded from suing because Section 9 (a) of the Trading with the Enemy Act expressly limited suit to a person 'not an enemy.'"

The petition further says (pp. 5-7) that the District Court in 1929 held:

> "That Sielcken while an enemy as defined in the Act, did not become an enemy within the meaning of the dissolution doctrine, and that the claim therefore did not pass to Sielcken but remained a partnership asset. The question was never mooted and Judge CAFFEY did not decide whether the court was without jurisdiction of the suit because Sielcken was admittedly an 'enemy' within the meaning of the Trading with the Enemy Act. Apparently it was assumed by all parties that the court did have jurisdiction."

This is asserted in the face of the motion of the Custodian and Treasurer to dismiss the bill and in the face of the allegations of the bill that the plaintiffs had never been enemies or allies of enemies, and that Sielcken was a citizen and resident of the United States up to the time of his death, and in the face of the decree sustaining these allegations.

The District Court did not find, and it was not admitted, that Sielcken was an "enemy within the meaning of the Act."

The petition attempts to support its statement by a quotation in the footnote on page 6 from a mere colloquy between Court and counsel, but even the colloquy plainly shows that the view of the Court was that the mere fact that an American citizen "was in an enemy country" at the outbreak of the war did not make him an "enemy" within the meaning of the statute; and therefore did not result in a dissolution of an American partnership of which he was a member.

It should be noted in passing that there has never been any question whatsoever, even on the motion to vacate, as to the non-enemy status of the plaintiffs.

(E) Having exhibited such disregard of the issues and the determination of them by the 1929 decree, the petition naturally makes many statements of fact contrary to what was necessarily adjudged by the decree.

For example, it says that the Articles of Co-partnership required the surviving partners to pay over the assets of the partnership to Sielcken's executors on his death. We shall not burden the Court with an analysis of the Articles of Co-partnership, the construction of which was for the trial court. The petitioner's statement is incorrect; but, on this application, it is sufficient for the Court to know that the decree of 1929 expressly adjudged that Z.E.G. was indebted "to the plaintiffs", who sued as surviving partners, and that the debt should be paid "to the plaintiffs" (R. 331-332).

The petition also says on page 3 that "Sielcken died in Germany on October 8, 1917 after having resided there continuously since 1914," despite the express averment in paragraph First of the bill above quoted, that Sielcken was at all times up to the time of his death a citizen and resident of the United States; an allegation sustained by the decree.

Since the conduct of the trial, the rulings of the Trial Court and the sufficiency of the evidence are not under review, it would be inappropriate to discuss, indeed space will not permit of any discussion of the merits of the original cause.

(F) The question propounded on page 2 of the petition utterly ignores the issues and the determination of them by the decree of 1929.

That question assumes the non-enemy status of the plaintiffs who were expressly adjudged by the decree to have title to the claim sued on. That question assumes—despite the issues raised by the bill, by the motion to dismiss, and by the answers as above, and despite the decree of the Trial Court—that Sielcken was both the beneficial owner of the claim and an enemy; and on the basis of those assumptions the proposition contended for is, in effect, that the Court should have decided the issues in the case in favor of the defendants; and that not having done so, it had no jurisdiction to decide the case at all. But as a learned Judge has observed "The test of jurisdiction is the right to decide, not right decision." *Phebus* v. *Search* (264 Fed. 407, 411).

III.

The reasons for granting the writ assigned by the petition are unsound.

The petition says (p. 9): "The original suit was brought under Section 9(a) of the Trading with the Enemy Act, * * *."

Undeniably, the District Courts have jurisdiction of such suits. There is no claim to the contrary.

The Appendix to the petition quotes Section 9(a) with elisions. It makes no reference to Section 17 of the Act. We quote both these Sections in an Appendix hereto, sup-

plying an important elision from Section 9(a), plainly emphasizing that the right to sue is given persons "*claiming* any interest, right or title", etc.

It being conceded that the suit was brought under the Trading with the Enemy Act, all of the defendants having appeared, the defendants, Custodian and Treasurer, having moved to dismiss the bill on the ground of failure to allege facts sufficient to entitle the plaintiffs to relief under the Act, and all of the defendants having answered, the Trial Court was called upon to interpret the Act, to decide whether the bill stated facts sufficient to bring the case within the Act, and to adjudicate the issues raised by the pleadings; and a decree having been rendered after a trial participated in by all parties, it is *res judicata.*

Having the power to decide, any errors made by the Trial Court, whether of fact or law, (and we are far from suggesting that there were any), could be reviewed only by direct appeal from that decree of 1929.

The Circuit Court of Appeals relied on two recent decisions of this Court:

> *Stoll* v. *Gottlieb* (305 U. S. 165);
> *Chicot County Drainage District* v. *Baxter State Bank* (308 U. S. 371).

Since the decision of the Circuit Court of Appeals herein this Court has again reaffirmed the principle of those two decisions—*Sunshine Anthracite Coal Co.* v. *Adkins,* (No. 804 of this Term, decided May 20, 1940). See also *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66.

However, the petitioner asserts that the decision of the Court of Appeals herein is in conflict with the decision

of the Court of Appeals for the District of Columbia in *United States* v. *Ickes,* (84 Fed. [2d] 257), and that the present case should be governed by the case of *United States* v. *United States Fidelity & Guaranty Co.,* decided by this Court March 25, 1940 (84 L. C. Ed. 619).

The decision of the Court of Appeals in the *Ickes* case was expressly based on the ground that "the claim asserted "here is outside the class over which the District Court "was given jurisdiction" (p. 260 of opinion).

In the *Fidelity & Guaranty* case, this Court held that a judgment of the District Court against the United States on a cross-claim was void since no statutory authority had granted jurisdiction to that Court to entertain or adjudicate a cross-claim against the United States.

The line of demarcation is easily drawn.

On one side of that line, where the Court has jurisdiction to deal with the *class of case* presented, stand the present case and the long line of decisions culminating in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371; *Stoll* v. *Gottlieb,* 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66; *Sunshine Anthracite Coal Co.* v. *Adkins* (No. 804 this Term, decided May 20, 1940).

On the other side of that line stand cases where the record on its face showed a case *of a class* over which the Court had no jurisdiction whatever. Such are the cases of *United States* v. *United States Fidelity & Guaranty Co.,* decided by this Court on March 25, 1940 (84 L. C. Ed. 619); *Vallely* v. *Northern F. & M. Ins. Co.,* 254 U. S. 348;

Sevilleta de la Joya Grant v. *Belen Land Grant*, 242 U. S. 595; *Yamashita* v. *Hinkle*, 260 U. S. 199, and *United States* v. *Ickes*, 84 Fed. (2d) 257.

In each of the latter set of cases the Court entering the challenged decree had no jurisdiction whatever over the *class* of case which the record before it presented; and there, as this Court said in the *Vallely* case, "to extend the Act" (so as to cover the excepted class) "is to enact a law, not to execute one" (254 U. S. 356).

In the present case, the District Court undeniably had jurisdiction of cases brought under the Trading with the Enemy Act, and concededly the present case was such a suit. In fact, the bill on its face declared that it was brought under that Act (R. 320) and the present petition admits that it was so brought (Pet. p. 3).

The plaintiffs were admittedly not enemies. That the debt was owing to them was directly challenged by Z.E.G.'s answer (R. 329, 331) and the Court decided expressly that the debt was due to them as surviving partners. The allegations of the bill that they had filed this claim with the Custodian and had made no application to the President (R. 322), were expressly admitted by the answer (R. 339).

The suit was thus in every feature directly within the terms of the Act.

The petitioner has failed to note the radical distinction between erroneous exercise of jurisdiction and assumption of a jurisdiction not possessed. That distinction has been too plainly pointed out by this Court in multitudinous decisions to require further elaboration.

There is no question in this case concerning representatives of the Government conferring pretended jurisdiction by silence or acquiescence. This respondent made no such claim. And the Circuit Court of Appeals took no such position. The statute under which the suit was brought conferred the jurisdiction. In the exercise of the jurisdiction so conferred, the District Court was required to decide, and its decree necessarily imports that it did decide, every question which the Attorney General has now sought to retry on affidavits. One decision by the Court of first instance was all the defendants were entitled to. If aggrieved in respect of any matter, either of fact or law, their remedy was to appeal. Even though the decision had been erroneous on every issue involved, it would still be conclusive unless and until corrected on appeal.

Chicot County Drainage District v. *Baxter State Bank* (308 U. S. 371);
Stoll v. *Gottlieb* (305 U. S. 165);
In re Metropolitan Trust Co. (218 U. S. 312);
Dowell v. *Applegate* (152 U. S. 327);
Des Moines Nav. & R. R. Co. v. *Iowa Homestead Co.* (123 U. S. 552);
Bronson v. *Schulten* (104 U. S. 410);
M'Cormick v. *Sullivant* (10 Wheat. 192).

When analyzed, each contention advanced by the petitioner as a ground for the writ is based on a claim that the District Court in 1929 erred in its decision. No one of the petitioner's contentions really goes to any question of that Court's jurisdiction over the case presented to it. Every question presented by the 1938 motion had been presented and decided by the Trial Court in 1929.

The present case comes directly within the recent decisions of this Court in *Stoll* v. *Gottlieb*, 305 U. S. 165 and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371; and it is not within the principles declared in the recent decision of this Court in *United States* v. *United States Fidelity & Guaranty Co.*, decided March 25, 1940 (84 L. C. Ed. 619).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD B. SMITH and
SELDEN BACON,
Solicitors for Irving Trust Company, as Executor.

NATHAN L. MILLER,
SELDEN BACON,
Of Counsel.

Appendix.

Trading With The Enemy Act.

SECTION 9. (*a*) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a

corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SECTION 17. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary' (sections 225 and 345 of Title 28 Judicial Code and Judiciary)."

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